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IN THE

Supreme Court of the United States

KURT H. EICHORN, WILLIAM J. HUCKINS, T. ROGER KIANG, EDWARD W. LANDIS, ORLANDO NAPOLITANO, GILBERT G. DALEY, SUSAN H. DIBONA, BETH KING, MICHAEL S. ORATOWSKI, THOMAS L. SALISBURY, LAWRENCE WALSH, WILLIAM LAWLESS, RUSSELL LEPPALA, GABE P. TOROK, JUDITH B. BRUGNER, KATE HARRIS, CAROLE T. JOHNSON, CHARLES O. LAUGHLIN, II, MICHAEL A. MCFARLAND, BARBARA OLIVER, GARY PATTERSON, ROBERT PROULIX, WILLIAM J. SCHROTT, ROBERT MICHAEL SHEPHERD, RONALD A. SOKOL, JOSEPH T. SZLASA, DIANE F. TAYLOR, LORRAINE J. WELCH, and MARIE ZEITS, individually and on behalf of all others similarly situated,

Petitioners,

v.

AT&T CORP., LUCENT TECHNOLOGIES INC., TEXAS PACIFIC GROUP, NCR CORPORATION, and THE CIT GROUP, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT TEXAS PACIFIC GROUP

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QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition where the Third Circuit's opinion in *Eichorn v. AT&T Corp.*, 484 F.3d 644 (3d Cir. 2007), does not conflict with either a decision of this Court or of another Court of Appeals.

II. Whether the interplay of Sections 510 and 502(a)(1)(B) of ERISA implicates an important federal question that has not already been settled by this Court.

III. Whether the lower courts' decisions have the effect of nullifying all claims for relief in a properly plead and proven complaint under § 510 of ERISA.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Texas Pacific Group, has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Respondent Texas Pacific Group ("TPG") submits this brief in opposition to Petitioners' application for a Writ of Certiorari. Petitioners are former employees of AT&T Paradyne, which was sold by Respondent Lucent Technologies Inc. ("Lucent") to affiliates of TPG. When the sale closed, Petitioners ceased participating in Lucent's pension plan and began participating in the new Paradyne Corporation's pension plan.

Petitioners do not allege any breach of the terms of the Lucent pension plan. Nor do they allege that Respondents breached any fiduciary duty. Petitioners admit that they did not lose even a single cent of their vested pension benefits in the Lucent pension plan. Nevertheless, Petitioners allege that no-hire restrictions in place during the course of the sale and for a 245-day period following the closing "interfered" with their ability to bridge their terms of service under the Lucent pension plan in the event that they were to return to employment with Lucent. At least three of the Petitioners were re-employed by Lucent and bridged their terms of service. The remaining Petitioners were never re-employed by Lucent, yet they seek money damages, under § 510 of ERISA, 29 U.S.C. § 1140, as if they had actually worked for Lucent without interruption.

The District Court properly dismissed Petitioners' complaints because the relief that they seek, *i.e.*, money damages, cannot be awarded under the relevant enforcement provision of ERISA, § 502(a)(3), 29 U.S.C. § 1132(a)(3). The District Court's decision and the Third Circuit's affirmance of that decision were both premised on this Court's binding opinions in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), and *Great-West Life & Annuity Insurance Company v. Knudson*, 534 U.S. 204 (2002), which collectively hold that § 502(a)(3) permits awards of equitable relief *only*. Because the Petitioners failed to plead a single form of equitable relief recognized at common law, the lower courts' correctly held they had no basis for recovery under § 502(a)(3).

Petitioners have not demonstrated any compelling reasons in accordance with Supreme Court Rule 10 to justify granting their Petition. First, Petitioners have not established that the rulings by the District Court and the Third Circuit conflict with any decision of this Court. Second, Petitioners have not established that the lower court rulings conflict with any decision of another Court of Appeals. Third, the lower court rulings do not implicate an important question of federal law that has not been, but should be, addressed by this Court. Finally, the lower courts' decisions do not have the effect of nullifying all claims for relief under § 510. The typical § 510 case arises when an employer wrongfully discharges an employee to prevent his or her pension rights from vesting, and the typical relief accorded under § 502(a)(3) is reinstatement to employment plus any ancillary monetary relief. Here, Petitioners were not wrongfully discharged; they have not lost any vested pension benefits; and they are not seeking reinstatement to employment. Petitioners are not the type of claimants contemplated by § 510.

The fact that Petitioners have no remedy under § 510 does not render the statute nugatory. As this Court held in *Mertens*, ERISA was intended to balance competing employer/employee interests; therefore, not all potential plaintiffs are provided with a remedy under ERISA. It is understood and accepted that certain ERISA plaintiffs can be left without a remedy. If an exception to that result is to be made, Congress must make it, not this Court. The Petition should be denied.

STATEMENT OF THE CASE

In 1989, AT&T Corp. ("AT&T) acquired Paradyne Corporation, which thereafter became known as AT&T Paradyne. (Pet. App. at 42a.) The employees of AT&T Paradyne immediately became eligible to participate in AT&T's defined benefit pension plan (the "AT&T Pension Plan"). (*Id.*) The AT&T Pension Plan contained a six-month "bridging" provision. (*Id.*) Under the terms of that provision, if an employee left his or her employment with AT&T or an AT&T-affiliated company only to return to a position within the AT&T family of companies

within six months, that employee could immediately "bridge" his or her pension benefits as if no interruption in service had occurred. (*Id.*) If, however, an employee returned after that initial six-month period, he or she would have to work for AT&T or an AT&T-affiliated company for five years before bridging would occur. (*Id.*) This bridging provision did not create or confer any pension rights; rather, it set forth contract terms from which a plan participant might benefit in the future if certain conditions precedent were met.

During the corporate reorganization that resulted in the spin-off of Lucent and NCR Corporation from AT&T (the "Trivestiture"), control of AT&T Paradyne was transferred to Lucent. (Pet. App. at 43a.) As a result of the transfer, the pensions of the AT&T Paradyne employees became part of the Lucent defined benefit pension plan (the "Lucent Pension Plan"). The provisions of the Lucent Pension Plan were substantially the same as those of the AT&T Pension Plan, except that the Lucent Pension Plan was later amended to reduce the bridging period from five years to three years.

In October 1995, before the Trivestiture was completed, AT&T announced that it was seeking buyers for AT&T Paradyne. (*Id.*) AT&T determined that in order to sell AT&T Paradyne as a viable business, it needed to take affirmative steps to preserve the intellectual capital embodied in AT&T Paradyne's workforce. (*Id.*) Accordingly, as of October 18, 1995, AT&T imposed a hiring restriction that prevented AT&T Paradyne employees from transferring to positions within AT&T or any of its affiliated companies (the "Preliminary Net"). (*Id.*)

In or around April 1996, Lucent began negotiations with affiliates of TPG for the sale of AT&T Paradyne. (*Id.*) The negotiations between Lucent and TPG culminated in the execution of a Purchase Agreement dated as of June 18, 1996 (the "Purchase Agreement"). (*Id.*) TPG wanted to ensure that certain employees of AT&T Paradyne, whose skills and expertise were viewed as an essential asset of the business, would remain part of the workforce for a period of time sufficient to facilitate

a successful transition from AT&T Paradyne to the new Paradyne Corporation. To achieve this purpose, the parties agreed that Lucent, AT&T, and their affiliated companies would not hire away AT&T Paradyne employees making in excess of $50,000 pending the closing of the sale. (Pet. App. at 43a – 44a.) This covenant, memorialized in Paragraph 4.5 of the Purchase Agreement, has been referred to throughout this litigation as the "Pre-Closing Net." (Pet. App. at 44a.)

In furtherance of the effort to maintain the employment of those Paradyne employees whose talents were needed for the short-term viability of the new Paradyne Corporation, the parties also entered into an Employee Matters Agreement dated as of July 31, 1996, the date of the closing. (*Id.*) Paragraph 1.3 of the Employee Matters Agreement prohibited Lucent, AT&T, and their affiliates from hiring certain Paradyne employees (*i.e.*, those earning more than $50,000) for 245 days after the closing. (*Id.*) This hiring restriction has been referred to throughout this litigation as the "Post-Closing Net." (*Id.*) The Post-Closing Net did not apply to employees who were involuntarily terminated by Paradyne after the closing.

Petitioners' contention that TPG "was unwilling to buy [AT&T] Paradyne if the purchase entailed continuing [AT&T] Paradyne's pension plan" (*see* Petition at p. 3) is not supported by the record below and, in fact, is inaccurate. As Paradyne's new owner, TPG could not under any circumstance have continued *Lucent's* pension plan. TPG did offered Paradyne employees a defined contribution plan.

Also inaccurate and unsupported by the record below is Petitioners' allegation that "Plaintiffs' pensions were eliminated if they worked for TPG, and Petitioners were prevented from retaining their pension rights by transferring to another AT&T affiliate as contemplated in the bridging right." (*See* Petition at p. 4.) The sale of AT&T Paradyne to TPG did not terminate the Lucent Pension Plan or Petitioners' rights therein. Petitioners continued to have fully-vested pension benefits in the Lucent Pension Plan following the sale; they simply could not, as

employees of the new Paradyne, accrue additional benefits under the Lucent Pension Plan. Not one penny of Petitioners' vested pension benefits were lost, and the Petitioners began to accumulate pension benefits under the new Paradyne's defined contribution plan. Further, Petitioners were not prevented by the sale from bridging their pension rights. Three of the twenty-nine Petitioners returned to employment with Lucent following the expiration of the Post-Closing Net and remained there long enough to bridge their service under the applicable provisions of the Lucent Pension Plan. (Pet. App. at 5a n.1.)

Shortly after the closing, Petitioners filed these consolidated actions alleging that the Preliminary, Pre-Closing and Post-Closing Nets violated § 1 of the Sherman Antitrust Act and § 510 of ERISA by depriving them of the opportunity to take advantage of the six-month bridging provision under the AT&T and Lucent Pension Plans. (Pet. App. at 45a – 46a.) The antitrust counts were dismissed by the District Court in an earlier ruling, and the dismissal of those counts was affirmed by the Third Circuit in *Eichorn v. AT&T Corp.*, 248 F.3d 131 (3d Cir.), *cert. denied*, 534 U.S. 1014 (2001) ("*Eichorn I*"). (Pet. App. at 45a.)

Following the Third Circuit's decision in *Eichorn I*, the District Court reopened discovery as to the ERISA claims. (Pet. App. at 6a.) On May 27, 2003, three months after the close of reopened discovery and seven years into the litigation of this case, Petitioners for the first time offered purported damage "calculations" as to lost future pension benefits. (*Id.*) These calculations were prepared by Petitioners' counsel's son, Stephen Crowley, who specifically was not offered as an expert and had no training as an actuary or in the field of employment benefits. (*Id.*) Although the District Court expressly warned Petitioners about their plan to proceed without expert testimony on the issue of damages, Petitioners insisted that no expert testimony was needed. (Pet. App. at 13a.)

On December 12, 2003, the Respondents filed a motion to strike Mr. Crowley's damages calculations and to bar him from testifying at trial. (Pet. App. at 46a.) In opposing the motion,

Petitioners argued that, if the District Court granted Respondents' motion, Petitioners should be permitted to engage a damages expert. (Pet. App. at 7a.) On November 10, 2004, the District Court entered an Order barring Stephen Crowley from testifying at trial; barring the admission of Stephen Crowley's calculations and report; and denying as untimely Petitioners' application to engage an expert witness. (Pet. App. at 46a.) The District Court's Order precluded Petitioners from admitting evidence of lost future pension benefits and expressly limited the scope of possible recovery to equitable relief and back pay. (*Id.*) Specifically, the District Court held that it did "not reach the issue whether Petitioners can quantify or establish any right to 'back pay' and/or equitable relief increasing plaintiffs' pension benefits and reserves such issue for resolution at or before trial." (Pet. App. at 8a.)

Following the entry of the District Court's Order, Respondents served narrowly tailored interrogatories upon the Petitioners addressing only the issue of damages (the "Damages Interrogatories"). (Pet. App. at 48a.) Interrogatory No. 5 required each Petitioner to "[i]dentify all damages you claim as a result of the allegations contained in the Complaint, which have not been precluded by the Court's November 10, 2004 Order and set forth fully and comprehensively the method of computation used to reach the damage figures." (*Id.*) Each of the Petitioners who responded to this interrogatory purported to calculate some form of monetary damages. (Pet. App. at 49a.) No equitable relief was demanded. (Pet. App. at 50a.)

Based upon Petitioners' answers to the Damages Interrogatories, Respondents filed a motion for summary judgment on the grounds that the relief demanded by Petitioners could not be recovered under the relevant civil enforcement provision of ERISA. (Pet. App. at 46a.) The District Court granted Respondents' motion, holding (1) that Petitioners' claims under § 510 of ERISA could not be enforced through the remedial provisions of § 502(a)(1)(B), and (2) that the money damages sought by Petitioners could not be recovered under

the "appropriate equitable relief" language of § 502(a)(3). (Pet. App. at 53a – 68a.) The District Court found that the damages sought by the Petitioners, whether characterized as compensatory or restitutionary, were not equitable in nature and therefore not recoverable as part of a § 510 claim under ERISA. (*Id.*)

On May 2, 2007, a three-judge panel of the Third Circuit affirmed the District Court's award of summary judgment in favor of Respondents and further held that the District Court was well within its discretion in excluding Stephen Crowley's damage calculations and testimony and in denying Petitioners' untimely application to engage a damages expert. *Eichorn v. AT&T Corp.*, 484 F.3d 644 (3d Cir. 2007) ("*Eichorn II*"). On May 31, 2007, the Third Circuit denied Petitioners' application for rehearing and rehearing *en banc*. (Pet. App. at 33a.) On August 31, 2007, Petitioners filed a Petition for Writ of Certiorari with this Court. In their Petition, Petitioners are seeking review only of the award of summary judgment. (Petition at p. *i*.) Petitioners are not appealing the exclusion of Stephen Crowley's damages calculations and testimony, or the denial of their application to engage a damages expert. (*Id.*)

REASONS FOR DENYING THE PETITION

The rulings by the District Court and the Third Circuit do not conflict with either a decision of this Court or a decision of any Court of Appeals. Nor do the lower court rulings implicate an important question of federal law that has not previously been addressed by this Court. Thus, Petitioners have not demonstrated any compelling reasons for granting their Petition, as required by Supreme Court Rule 10.

I. The Rulings Of The Courts Below Are Not In Conflict With Any Decision Of This Court.

A. The Decisions Of The District Court And Third Circuit Do Not Conflict With *Varity*.

Petitioners argue that the rulings of the District Court and the Third Circuit in *Eichorn II* conflict with *Varity Corp. v.*

Howe, 516 U.S. 489 (1996), because they denied relief "identical" to that awarded to the *Varity* plaintiffs. This simply is not true. In *Varity*, the plaintiffs were seeking the equitable remedy of reinstatement to a welfare benefits plan that they had been defrauded into leaving. At no time over the ten years that this case has been litigated have Petitioners ever sought reinstatement to employment with Lucent. Indeed, Petitioners have no need for reinstatement because unlike the plaintiffs in Varity, they have at all times remained vested pension beneficiaries in the Lucent Pension Plan. The reality is that Petitioners are not seeking any equitable remedy at all – in the form of reinstatement or otherwise.

In *Varity*, the defendant-employer transferred several unprofitable divisions of a subsidiary corporation to a new corporate entity and persuaded many of the employees working in those divisions to switch their benefits to the plan offered by the new entity. *Varity*, 516 U.S. at 493-94. The employer assured the employees that their benefits would remain secure even though the employer knew from the outset that the new entity was insolvent. *Id.* at 494. In a matter of two years, the new entity was in receivership, resulting in the loss of the employees' non-pension benefits. *Id.* Proceeding under § 502(a)(3), the plaintiff-employees sought to recover for the employer's breach of fiduciary duty and were awarded reinstatement to the plan that they had been deceived into leaving. *Id.* at 494-95.

Petitioners claim that the relief they seek is consistent with the relief sought by the *Varity* plaintiffs. Petitioners contend that they, like the plaintiffs in *Varity*, are seeking equitable relief that would result in a modification of plan records. This claim is demonstrably false for numerous reasons.

1. Petitioners Are Not Seeking Reinstatement Or Any Other Form of Equitable Relief.

Petitioners are not seeking the type of equitable relief awarded in *Varity*. The *Varity* plaintiffs were reinstated to a self-funded *welfare* benefits plan. *Varity*, 516 U.S. at 492. All claims

regarding pension benefits had been settled. *Howe v. Varity Corp.*, 36 F.3d 746, 749 (8th Cir. 1994), *cert. granted*, 514 U.S. 1082 (1995), *aff'd*, 516 U.S. 489 (1996). The order of reinstatement would have compelled the employer to provide the plaintiffs with basic health, major medical, life insurance, vision care, hearing care, and dental benefits. *See id.* Such an order clearly constitutes a mandatory injunction compelling the employer to perform specific action and thus is unquestionably equitable in nature.

However, even if the *Varity* plaintiffs had been reinstated to a pension benefits plan, that relief would be distinguishable from the remedy sought by Petitioners. When the *Varity* plaintiffs left their jobs with the healthy subsidiary to move the failing subsidiary, they took with them all of their vested pension benefits. When the new entity folded, all of the plaintiffs' vested pension benefits were lost. An order reinstating the plaintiffs to the pension benefits plan of the healthy subsidiary would have restored to plaintiffs the benefits that already belonged to them but had been destroyed as a result of their employer's fraud in the inducement.

Although labeled as "reinstatement," the relief awarded in *Varity* was very much akin to the rescission remedy crafted by the Fourth Circuit in *Griggs v. E.I. DuPont de Nemours & Company*, 385 F.3d 440 (4th Cir. 2004). In Griggs, the plaintiff took early retirement after learning that he was eligible to participate in DuPont's temporary pension system, a program that paid eligible employees one month's salary for every two years of service. *Griggs*, 385 F.3d at 442. The early retirement benefit could be taken in the form of a lifetime annuity with monthly payments that would be subject to federal taxes or as a lump sum that could be rolled over into a tax-free IRA or other qualified retirement account. *Id.* Plaintiff elected the lump-sum distribution. *Id.* Before plaintiff officially retired, however, DuPont learned that because of plaintiff's salary level, his lump-sum benefit could not be rolled over and would be subject to federal taxes. *Id.* DuPont never informed plaintiff of this, and

when he retired, DuPont withheld $50,000.00 of his $132,000.00 benefit for federal taxes. *Id.* Plaintiff sued under § 502(a)(3), and the district court determined that DuPont had breached its fiduciary duty by failing to tell plaintiff that he was ineligible for a tax-free lump-sum distribution. 385 F.3d at 442. Ultimately, the district court fashioned a rescission remedy, *i.e.*, allowing plaintiff to rescind his original election of a lump-sum payment and select the annuity payment instead. *Id.* at 443. Rescission is, of course, a remedy traditionally available in equity. Therefore, the Fourth Circuit upheld the rescission of plaintiff's election as equitable relief under § 502(a)(3), 29 U.S.C. § 1132(a)(3). *Id.*

In *Varity*, the plaintiffs were similarly allowed to rescind their election to join the benefits plan of the new subsidiary and to return to the original plan. The plaintiffs were thus restored to their pre-election position. Here, Petitioners are not looking to be restored to their pre-sale position. Prior to the sale, Petitioners had deferred vested pension benefits in the Lucent Pension Plan, and they maintained those exact benefits after the sale. Petitioners, therefore, have no need for reinstatement/ rescission. Petitioners instead seek enhancement of their pre-sale position and credit for service that they never gave to Lucent, AT&T, or any of their affiliated companies, service which Petitioners admit was dependent upon their continued employment with a Lucent or AT&T affiliated company. (*See* Petition at p. 11.) Awarding Petitioners enhanced pension benefits on the basis of service that they never gave constitutes a windfall to Petitioners. Certainly, it is not, as Petitioners suggest, judicial adherence to the equitable maxim that equity regards as done that which ought to be done. Rather, it is an undeniable award of compensatory damages.

2. Petitioners Are Seeking Money Damages In Compensation For A Loss Allegedly Suffered At The Hands of Respondents.

Petitioners' alleged equitable relief is nothing more than a prayer for compensatory damages poorly cloaked in the mantle

of equity. However, this Court has made abundantly clear that § 502(a)(3), which is the applicable remedial provision for claims under § 510, 29 U.S.C. § 1140, permits awards of equitable relief only. *Mertens v. Hewitt Associates*, 508 U.S. 248, 257-58 (1993). Compensatory damages or awards of restitution at law are not recoverable under § 502(a)(3). *Mertens*, 508 U.S. at 257-258; *Great-West Life & Annuity Insurance Company v. Knudson*, 534 U.S. 204, 215 (2002).

Each and every Petitioner who responded to the Damages Interrogatories served by Respondents purported to calculate some form of money damages. Interrogatory No. 5 required each Respondent to "[i]dentify all damages you claim as a result of the allegations contained in the Complaint, which have not been precluded by the Court's November 10, 2004 Order and set forth fully and comprehensively the method of computation used to reach the damage figures." The responses, without objection, caveat, or reference to injunctive relief, uniformly invoke formulae and manipulate numbers in order to arrive at amounts of money damages allegedly owed to Petitioners. The money damages sought by Petitioners cannot qualify as equitable relief. As this Court explained in *Great-West*,

> [a]lmost invariably ... suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of a legal duty.

Great-West, 534 U.S. at 210 (citations omitted).

In an attempt to circumvent § 502(a)(3)'s clear mandate against compensatory damages, Petitioners claim that they are seeking equitable relief in the form of an order or decree crediting them with additional service time and recalculating their benefits. In reality, Petitioners' proposed "equitable decree" is simply euphemism for an award of money damages. Petitioners

cannot overcome § 502(a)(3)'s prohibition against the recovery of monetary damages simply by attaching an equitable label to a legal remedy. *Crosby v. Bowater Incorporated Retirement Plan for Salaried Employees of Great Northern Paper Co.*, 382 F.3d 587, 595 (6th Cir. 2004), *cert. denied*, 544 U.S. 976 (2005) (holding that plaintiff's demand for a constructive trust could not "transmogrify" his legal claim for a money judgment into an equitable remedy). *See also Bowen v. Massachusetts*, 487 U.S. 879, 915-16 (1988) (Scalia, J., dissenting) ("It does not take much lawyerly inventiveness to convert a claim for payment of a past due sum (damages) into a prayer for an injunction against refusing to pay the sum, or for a declaration that the sum must be paid, or for an order reversing the agency's decision not to pay.") In effect, Petitioners' request for an equitable decree is a demand for an injunction to compel payment of money. However, that type of relief could not be awarded in equity because it was the functional equivalent of a claim for money damages. *Great-West*, 534 U.S. at 210-11. Thus, Petitioners' so-called equitable decree is not an equitable form of relief at all.

For all of the reasons set forth above, the District Court and Third Circuit's decisions are not in conflict with the reasoning articulated by this Court in *Varity*.

B. The Decisions Of The District Court And Third Circuit Do Not Conflict With *Bowen*.

Petitioners contend that the lower court rulings were in conflict with "a *minor* aspect" of this Court's ruling in *Bowen v. Massachusetts*, 487 U.S. 879 (1988). *Bowen*, which is not an ERISA case, addresses the circumstances under which an order for the prospective payment of money is regarded as equitable as opposed to legal relief. Neither the District Court nor the Third Circuit discussed *Bowen* in its decision. Because *Bowen* is both legally and factually distinguishable from the matter under consideration, there was no reason for the lower courts to focus on it. The absence of a discussion of *Bowen* in the lower courts' analyses does not present a compelling reason to grant the Petition.

In *Bowen*, the Department of Health and Human Services ("HHS") denied Medicaid reimbursement to the State of Massachusetts for certain medical and rehabilitative services. *Bowen*, 487 U.S. at 886-87. The state appealed to HHS' Grant Appeals Board, which affirmed the disallowances. *Id.* at 887. The state then filed a complaint with United States District Court. *Id.* The district court reversed the Board's disallowance, and HHS appealed to the First Circuit on the grounds that the district court lacked subject matter jurisdiction to review the Board's disallowance decision and that the appropriate remedy was a suit for past due amounts in the United States Claims Court. *Id.* at 888-90. The First Circuit affirmed in part and reversed in part, holding that the district court had jurisdiction to review the Board's disallowance and grant injunctive and declaratory relief, but not to order the release of the disallowed funds to the state. *Id.* at 889-90.

This Court granted certiorari and held that the district court's decision should have been affirmed in its entirety because the order compelling HHS to perform its statutory obligations was one for injunctive relief, not money damages. *Id.* at 891, 900-01. This Court explained that performance of HHS' statutory obligations in this instance happened to involve the payment of money. *Id.* at 901. The fact that money would pass from the federal government to the state as a result of ordering HHS to carry out its statutory mandate did not, according to this Court, transform the nature of the relief sought from specific relief, which is equitable, to money damages, which are legal. *Id.* at 901 (citations omitted).

In its opinion, the *Bowen* majority opinion did not distinguish between the order compelling HHS to make past-due reimbursements and the order compelling HHS to make future reimbursements. Under the majority's reasoning, both orders required HHS to satisfy its statutory mandate and therefore constituted specific, *i.e.*, equitable, relief. The dissent, however, agreed only that the order compelling prospective payment was equitable. *Id.* at 921-22. Petitioners seize upon

this point of agreement between the majority and the dissent to claim that *Bowen* stands for the proposition that all relief compelling future payment is equitable. This is a complete misapprehension of *Bowen*. As Justice Scalia explained in his dissent, an order preventing the wrongful disallowance of future payment is equitable in nature because the potentially damaging action has yet to occur. *Id.* The order is not so much compelling future payment as it is enjoining the denial of future payment. Here, Petitioners are not seeking recovery for a wrong that they allege has yet to occur. They are seeking recovery of damages for the fictitious "elimination" of their "bridging rights" under the Lucent Pension Plan allegedly caused by the Post-Closing Net. The Post-Closing Net expired in April of 1997. Thus, the "damage" allegedly caused by the Post-Closing Net is done and cannot recur, as it can when the federal government disallows Medicaid reimbursements to a state year after year on the same grounds. Petitioners are not seeking an injunction compelling Respondents to honor an obligation for future payment of money; they are seeking money in compensation for an alleged past wrong. *Bowen* clearly states that that type of relief constitutes damages, the classic legal remedy. *Bowen*, 487 U.S. at 900-01. Thus, the relief sought in *Bowen* is legally distinguishable from the relief sought by Petitioners.

Even if *Bowen* could somehow be extrapolated to support the theory that awards of *future* pension benefits are equitable relief under § 502(a)(3), the Petitioners are precluded by the District Court's Order of November 10, 2004, from seeking such relief. That Order barred Stephen Crowley from testifying at trial, barred the admission of Stephen Crowley's calculations and report, and denied as untimely Petitioners' application to engage an expert witness. The District Court's Order expressly limited the scope of possible recovery to back pay and/or equitable relief and prevents Petitioners from seeking to admit evidence of lost future pension benefits. The Third Circuit affirmed the November 10, 2004 Order, finding that the District Court did not err in holding that the proposed damages

calculations were inadmissible and that it did not abuse its discretion in denying leave to retain an expert witness. The Petitioners had ample opportunity during seven years of discovery to engage a damages expert and made a deliberate, strategic decision not to retain one even after repeated warnings from the District Court. Petitioners are not seeking review of the November 10, 2004 Order in their Petition. Thus, any and all of Petitioners' arguments regarding their alleged entitlement to *future* pension benefits under § 502(a)(3) should not be considered by this Court.

Because *Bowen* is both legally and factually inapplicable to the case at bar, it does not present a compelling reason to grant the Petition.

II. The Rulings Of The Courts Below Are Not In Conflict With The Decision Of Another Court Of Appeals.

Petitioners contend that Third Circuit's decision in *Eichorn II* is in conflict with rulings by other Courts of Appeals. Specifically, Petitioners argue that *Eichorn II* is contrary to holdings by the Tenth Circuit in *Millsap v. McDonnell Douglas Corporation*, 368 F.3d 1246 (10th Cir. 2004) and *Administrative Committee of the Wal-Mart Associates Health and Welfare Plan v. Willard*, 393 F.3d 1119 (10th Cir. 2004); and by the Ninth Circuit in *Mathews v. Chevron Corporation*, 362 F.3d 1172 (9th Cir. 2004) and *Ennis v. Ennis*, 198 Fed. Appx. 594 (9th Cir. 2006). In fact, all of the purportedly conflicting opinions cited by Petitioners are in accord with the Third Circuit's analysis in *Eichorn II*. Therefore, there is no compelling reason to grant the Petition based upon a split among the Circuits.

A. The Tenth Circuit's Decision in *Millsap* Does Not Conflict With The Ruling Of The Third Circuit Below.

Petitioners claim that in *Millsap*, 368 F.3d 1246 (10th Cir. 2004), the Tenth Circuit entered an "equitable decree" that reflected a "willingness ... to use § 502(a)(3) to command affirmative changes affecting benefit entitlement, without regard

to the impact of such changes on monetary relief." (*See* Petition at pp. 9-10.) The entry of this equitable decree, Petitioners allege, is in conflict with the Third Circuit's decision in *Eichorn II*. In reality, the Tenth Circuit did not grant the *Millsap* plaintiffs any equitable relief. Moreover, the Tenth Circuit categorically rejected the argument that § 510 claimants can recover back pay, the only remedy arguably available to Petitioners here following the District Court's Order of November 10, 2004. Therefore, *Millsap* is in complete accord with the Third Circuit's decision.

In *Millsap*, the defendant, a military aircraft manufacturer, closed its assembly plant in Tulsa, Oklahoma and laid off all of its employees. *Millsap*, 368 F.3d at 1248. The employees brought suit under § 510 of ERISA alleging that the defendant closed the plant in order to prevent the employees from attaining benefits eligibility under the pension and health care plans. 368 F.3d at 1248. The district court bifurcated the case into liability and remedial phases. *Id.* After a 10-day bench trial, the district court concluded that the defendant violated § 510. 368 F.3d at 1248. In the remedial phase, plaintiffs sought, *inter alia*, restoration of benefits, back pay, and reinstatement (or front pay in lieu of reinstatement). Defendants moved to preclude awards of front pay, back pay and reinstatement. *Id.* at 1249. The district court denied defendants' motion as to back pay, but granted it as to front pay and reinstatement, finding that the former was inappropriate and the latter impossible under the circumstances. *Id.* Before the remedial phase proceeded any further, the parties entered into a stipulation of settlement, which compensated plaintiffs for their lost benefits and required judicial resolution of the back pay issue. *Id.* Thus, as in *Eichorn II*, the only remaining issue to be resolved by the court was the question of whether back pay was an appropriate equitable remedy under § 502(a)(3). The district court held that the plaintiffs could recover back pay under § 502(a)(3) because it was equitable restitution. *Millsap*, 368 F.3d at 1249. Plaintiffs did not appeal the denial of reinstatement or front pay to the

Tenth Circuit. *Id.*, n.3. On this issue of back pay, the Tenth Circuit resoundingly held that back pay in and of itself is not an equitable remedy and cannot be recovered by a § 510 plaintiff under § 502(a)(3) unless it is attendant to some form of equitable relief. *Millsap*, 368 F.3d at 1253.

The *Millsap* case is virtually indistinguishable from the instant matter. In *Millsap*, a stipulation of settlement was entered, reducing the available remedies to back pay. *Millsap*, 368 F.3d at 1249. Here, the District Court entered the November 10, 2004 Order limiting potential recovery to back pay. Freed from having to address the question of future pension benefits and focused solely on the issue of whether back pay is appropriate equitable under § 502(a)(3), the Tenth Circuit in *Millsap* and the Third Circuit in *Eichorn II*, relying on this Court's holding in *Great-West*, both concluded that it is not.

Finding no support in the decision that the Tenth Circuit actually rendered, Petitioners combed dicta to advance the hypothetical argument that, if the Tenth Circuit had addressed the issue of lost pension benefits, it would have granted the relief that the Third Circuit denied. (*See* Petition at p. 19.) Petitioners claim that "*Millsap* concluded that because § 510's 'purpose is to protect the participants in *employee benefit plans*' . . . claims for lost wages do not stand on the same protected footing as claims for lost benefits." (Petition at p. 19 (quoting *Millsap*, 368 F.3d at 1259 (emphasis in original))). The quote from *Millsap* is taken completely out of context. The full quote is: "We too have rejected claims for complete relief under ERISA because the statute's purpose is to protect the interests of participants *in employee benefit plans*." *Millsap*, 368 F.3d at 1259 (emphasis in original). The Tenth Circuit was explaining that ERISA is not a make-whole statute and that its drafters were primarily concerned with protecting the plan as opposed to individual beneficiaries. (*Id.*) The court was offering the reasons why it is sometimes necessary to deny relief to individual plaintiffs. It was in no way suggesting that the outcome would have been any different under § 502(a)(3) if lost benefits were

being sought rather than back pay. Moreover, Petitioners cannot demonstrate a split among the circuits based upon a ruling that they think the Tenth Circuit would have made if it had addressed the issue. Thus, *Millsap* offers no authority for granting the Petition.

B. The Tenth Circuit's Decision in *Wal-Mart* Does Not Conflict With The Ruling Of The Third Circuit Below.

Petitioners' reliance on *Wal-Mart* is completely misplaced. *Wal-Mart* is one of a discrete line of cases, beginning with this Court's ruling in *Great-West*, that deals with the ability of ERISA-regulated medical plans to use § 502(a)(3) to enforce subrogation clauses to recover the costs of benefits that were reimbursed by third parties. *See Administrative Committee of the Wal-Mart Associates Health and Welfare Plan v. Willard*, 393 F.3d 1119 (10th Cir. 2004). These cases articulate the circumstances under which reimbursement of funds to a medical plan constitutes equitable relief. In *Great-West*, the plan administrator was denied reimbursement because the administrator did not seek recovery from a particular fund upon which a constructive trust or equitable lien could be imposed but rather from the beneficiary's general assets, making the relief sought equivalent to "a judgment imposing personal liability upon the defendant to pay a sum of money." *Great-West*, 534 U.S. at 213-14. However, in *Sereboff v. Mid Atlantic Medical Service, Inc.*, 126 S. Ct. 1869 (2006), the plan administrator was permitted to recover the cost of benefits because it was seeking to enforce an equitable lien by agreement. *Sereboff*, 126 S. Ct. at 1875. This Court held that the language of the plan document created a lien in a specifically identifiable fund, *i.e.*, in any monies recovered from third-party tortfeasors, and that enforcement of that lien was a form of equitable remedy under § 502(a)(3). 126 S. Ct. at 1875.

Wal-Mart antedates *Great-West* and predates *Sereboff*. The Petitioners argue that because the Tenth Circuit's decision in *Wal-Mart* allowed the medical plan to recover monetary relief

under § 502(a)(3), *Wal-Mart*, 393 F.3d at 1126, it conflicts with the Third Circuit's allegedly narrow reading of *Great-West* in *Eichorn II*. Petitioners are mistaken. The Tenth Circuit in *Wal-Mart* and the Third Circuit in *Eichorn II* analyzed and applied *Great-West* in exactly the same way. Both courts correctly recognized that *Great-West* poses the threshold question of whether the relief sought was equitable in nature. In *Wal-Mart*, the answer to that question was yes. Although *Sereboff* had yet to be decided, in retrospect it is clear that the plan administrator in *Wal-Mart* was seeking enforcement of an equitable lien by agreement. *Wal-Mart*, 393 F.3d at 1120. Even under a pre-*Sereboff* analysis, the relief sought in *Wal-Mart* was equitable, namely, the imposition of a constructive trust over a specified fund in the constructive possession of the beneficiary. *Wal-Mart*, 393 F.3d at 1119, 1121. In *Eichorn II*, the Third Circuit correctly answered *Great-West*'s threshold inquiry in the negative because Petitioners are not seeking monetary relief through legitimate and recognized equitable means. At no time, have Petitioners sought the imposition of an equitable lien or a constructive trust. Nor have Petitioners ever pointed to a specifically identifiable fund that belongs in good conscience to them but instead is in the possession and control of the Respondents. Rather, Petitioners are seeking an award of make-whole money damages from the general assets of the Respondents. This is especially true in the case of Respondent TPG, which was never in possession, custody or control of any funds in any way connected to the Lucent or AT&T Pension Plans. Therefore, the Third Circuit's denial of relief in *Eichorn II* was in complete accord with this Court's decision in *Great-West* and the Tenth Circuit's decision in *Wal-Mart*.

C. The Ninth Circuit's Decision in *Mathews* Does Not Conflict With The Ruling Of The Third Circuit Below.

Petitioners argue that the *Mathews* decision supports the proposition that under § 502(a)(3), a court may enter an equitable decree modifying the records of a pension plan. *See* Petition at

p. 10 (citing *Mathews v. Chevron Corporation*, 362 F.3d 1172, 1177 (9th Cir. 2004)). However, because of distinguishing factual circumstances, the relief granted in *Mathews* cannot be awarded to the Petitioners here. Therefore, the Third Circuit's decision below is not in conflict with the Ninth Circuit's reasoning in *Mathews*.

Plaintiffs in *Mathews* were retired former employees of Chevron's refinery in Richmond, Virginia. *Mathews*, 362 F.3d at 1177. Shortly after plaintiffs retired, the Richmond refinery implemented a favorable severance program which provided a benefit enhancement to any plan participant who was terminated without cause during a specified period of time. *Id.* at 1176, 1178. Although only involuntarily terminated employees were eligible for this program, employees could request involuntary termination in order to receive the enhanced benefit. *Id.* at 1176. Implementation of the program, which had been in effect throughout Chevron during plaintiffs' employment, was delayed in Richmond by local management. *Id.* at 1177-78. The plaintiffs successfully sued, alleging breach of fiduciary duty, and sought an injunction requiring Chevron to modify its plan records to reflect that plaintiffs had been involuntarily terminated. *Id.* at 1176. The Ninth Circuit upheld this relief as equitable in nature. Analogizing to the reinstatement remedy approved in *Varity*, the court held that "[i]f 'reinstating' employees into a plan constitutes 'appropriate equitable relief,' there is no reason to conclude that 'instating' them would not." *Mathews*, 362 F.3d at 1186.

The Petitioners cite *Mathews* in support of the proposition that, under § 502(a)(3), a court may order a modification of plan records from which monetary relief may flow. Whether the instatement relief awarded in *Mathews* is, in fact, the equitable equivalent of *Varity*'s reinstatement remedy is by no means clear. Assuming for the moment that instatement is indeed an equitable remedy, it is in no way comparable to the relief being sought by Petitioners here. The modification to the plan records in *Mathews* involved a simple change in plaintiffs' status

from retired to terminated and did not credit plaintiffs with additional service that they had not provided to their former employer. The modifications necessary for Petitioners to obtain the relief that they are seeking would require fictionalizing the Lucent Pension Plan records. The records would have to be changed to credit Petitioners with service that they never gave to Lucent. This change would be predicated on the highly speculative assumption that, but for the Post-Closing Net, all of the Petitioners would have been rehired by Lucent, AT&T or one their affiliates within six months and that the Petitioners would have continued to work in those positions for an amount of time sufficient to achieve service pension eligibility. The *Mathews* case which Petitioners rely so heavily upon establishes that a plan modification cannot be awarded under such uncertain circumstances. *Mathews*, 362 F.3d at 1186. The Ninth Circuit stated that the sole reason plaintiffs were receiving the relief they requested was because Chevron stipulated that any employee who requested involuntary termination under the severance program would have received it. *Id.* This stipulation removed any uncertainty over whether plaintiffs would have met the other miscellaneous requirements to qualify for the enhanced benefit. *Id.* However, there is no comparable stipulation in the present case. Therefore, the Third Circuit decision denying Petitioners relief under § 502(a)(3) was appropriate and was not in conflict with *Mathews*.

D. The Ninth Circuit's Unreported Decision in *Ennis* Does Not Conflict With The Ruling Of The Third Circuit Below.

Petitioners contend that, like *Bowen*, *supra*, *Ennis* recognizes that an order compelling fulfillment of a future obligation is equitable in nature and, hence, available under § 502(a)(3). *See* Petition at p. 23 (citing *Ennis v. Ennis*, 198 Fed. Appx. 594, 596 (9th Cir. 2001)). Petitioners, therefore, argue that like *Bowen*, *Ennis* is in conflict with the Third Circuit's decision herein. Petitioners again overlook factual distinctions that make *Ennis* inapposite to the instant case.

In particular, Petitioners fail to acknowledge – yet again – that the District Court's Order of November 10, 2004 precludes them from recovering future pension benefits. Therefore, like *Bowen*, *Ennis* does not create a compelling reason to grant the Petition.

In *Ennis*, plaintiff sued to enforce a promise by his former employer, a small business, to provide him with a pension. *Ennis*, 198 Fed. Appx. at 596. The district court held that plaintiff had a valid promissory estoppel claim and that the relief he sought was authorized by ERISA. *Id.* The district court entered an order compelling the employer to fund a pension for the plaintiff even though the employer's pension plan had been terminated. *Id.* The Ninth Circuit affirmed, holding that the district court's injunction was akin to an order reinstating a plaintiff in a benefits plan. *Id.* The Ninth Circuit further held that the relief sought was not legal in nature because it did not compel the payment of money past due under a contract, or specific performance of a past due monetary obligation. *Id.* Instead, it ordered the employer to fulfill a future obligation by creating a rabbi trust to fund a pension which plaintiff could draw on at a later date. *Id.*

Ennis is distinguishable from the instant matter in several ways. First, as discussed above, the instatement/reinstatement remedy, to which the *Ennis* injunction is allegedly akin, has not been sought by Petitioners here, nor would it be appropriate relief even it had been sought. Second, the Ninth Circuit held that the relief awarded in *Ennis* was equitable because it did not compel payment of past due amounts. *Ennis*, 198 Fed. Appx. at 596. Here, however, Petitioners are seeking payment of allegedly past due amounts from Respondents. Finally, the relief in *Ennis* essentially awarded future pension benefits, relief that is unavailable to Petitioners here because of the District Court's November 10, 2004 Order, which Petitioners have not appealed. Because of these factual distinctions, *Ennis* is not in conflict with the ruling of the Third Circuit below.

III. The Applicability Of § 502(a)(1)(B) To § 510 Claims Does Not Implicate An Important Question Of Federal Law That Has Not Previously Been Addressed By This Court, Nor Does It Involve A Split Among The Circuits.

Petitioners argue that the applicability of § 502(a)(1)(b) to § 510 claims implicates an important question of federal law that has not previously been but should be addressed by this Court. Although this Court has not issued a definitive holding on the subject, there is no need for this Court to take up the issue at this time. The language of the statute is clear and unmistakable, and the Courts of Appeals have been uniform in their interpretation of it. Therefore, the question of enforcement of § 510 through § 502(a)(1)(B) does not present a compelling reason to grant the Petition.

Section 502(a)(1)(B) enables a plan participant or beneficiary to "recover benefits due him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Courts interpreting this language have consistently held that the cause of action established in § 502(a)(1)(B) involves the assertion of a contractual right. *Russell v. Northrop Grumman Corp.*, 921 F. Supp. 143, 150 (E.D.N.Y. 1996). Thus, to recover under § 502(a)(1)(B), a plaintiff must allege that the defendant failed to abide by a particular term or terms of an employee benefit plan. *Russell*, 921 F. Supp. at 150. (citations omitted). As this Court noted in dicta in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), the language of § 502(a)(1)(B) "says nothing about the recovery of extracontractual damages." *Mass. Mutual*, 473 U.S. at 144. Therefore, implicitly only damages arising from a contractual cause of action are available under § 502(a)(1)(B). *Mass. Mutual*, 473 U.S. at 144.

Section 510, on the other hand, does not focus on the wrongful denial of contractual rights to which a participant is already entitled under the terms of the plan. *Russell*, 921 F. Supp.

at 150. Rather, § 510 prohibits a defendant's unlawful interference with a participant's ability to meet plan qualifications in the first instance. *Russell*, 921 F. Supp. at 150. The Seventh Circuit has held that the remedy afforded by § 502(a)(1)(B), *i.e.*, vindication of a *contractual* right, is incompatible with the *extracontractual* cause of action provided in § 510. *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1133 (7th Cir. 1992).

> When someone raises a Section 502(a)(1)(B) claim, he or she is essentially asserting his or her contractual rights under an employee benefit plan. And, the wrong that the person alleges in bringing such an action is that despite the fact that he or she has satisfied the conditions necessary for benefits under the plan, the defendant has failed to abide by the terms of the plan. *Not surprisingly, this court has concluded that Section 502(a)(1)(B) claims are creatures of contract law . . . Section 510, unlike Section 502(a)(1)(B), is not concerned with whether a defendant complied with the contractual terms of an employee benefit plan. Rather, the emphasis of a Section 510 action is to prevent persons and entities from taking actions which might cut off or interfere with a participant's ability to collect present or future benefits or which punish a participant for exercising his or her rights under an employee benefit plan.*

Tolle, 977 F.2d at 1133-34 (citations omitted) (emphasis added). *Accord Strom v. Goldman Sachs & Co.*, 202 F.3d 138, 142 (2d Cir. 1999) (holding that a claim under § 502(a)(1)(B) is the "assertion of a contractual right under a benefit plan"); *Læmis v. Medical Services Research Group, Inc.*, 2003 WL 22220527 (6th Cir.) at *2-3 (adopting the position articulated by the Seventh Circuit in *Tolle*).

Petitioners here do not allege that any particular provision of the Lucent Pension Plan has been violated, nor do they seek

a judgment enforcing any provision of the plan. Instead, Petitioners allege that Respondents' actions in connection with the sale of AT&T Paradyne, specifically the imposition of the Pre-Closing and Post-Closing Nets, interfered with Petitioners' ability to accrue additional benefits under the Lucent Pension Plan. Because no breach of any provision of the Lucent Pension Plan has been or can be alleged, the lower courts correctly held that § 502(a)(1)(B) does not provide the remedy for Petitioners' § 510 claims.

The three Court of Appeals decisions that Petitioners contend support the position that § 510 can be enforced through § 502(a)(1)(B), in fact, do not support that position. Puzzlingly, Petitioners cite to the Third Circuit's opinion in *Cox v. Keystone Carbon Company, et al.*, 894 F.2d 647 (3d Cir.), *cert. denied*, 498 U.S. 811 (1990), even though, as the Third Circuit expressly stated in *Eichorn II*, the *Cox* opinion does not contain an analysis of whether § 510 could be enforced through § 502(a)(1)(B). In fact, the Third Circuit correctly noted in *Eichorn II* that *Cox* actually undermines the Petitioners' argument because in *Cox*, the court stated that "*[t]o the extent that Cox seeks compensatory damages for tortious interference [under § 510], that claim does not fall within section 502(a)(1)(B).*" 894 F.2d at 650 (emphasis added). Thus, *Cox* does nothing to advance Petitioners' argument that § 502(a)(1)(B) offers a remedy for violations of § 510.

Petitioners also cite to *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156 (10th Cir. 1998), as another case allowing enforcement of a § 510 claim through § 502(a)(1)(B). *Adams* does no such thing. *Adams* involved a claim for breach of fiduciary duty under § 409 of ERISA, not a claim for interference with the attainment of benefits under § 510. *Adams*, 149 F.3d at 1158. Moreover, the plaintiffs in *Adams* were seeking an interpretation of certain provisions of the benefit plan and a declaration of their rights pursuant thereto. *Id.* Thus, in *Adams*, plaintiffs' claims arose out of the language of the contract and

were appropriately remedied under the terms of § 502(a)(1)(B). Here, Petitioners are not seeking relief for a contractual infraction. Indeed, Petitioners have never alleged that Respondents failed to comply with any specific plan provision, nor could they. Instead, Petitioners are pursuing an extracontractual claim, which cannot be remedied through § 502(a)(1)(B).

Finally, Petitioners cite language from *Crosby v. Bowater Incorporated Retirement Plan for Salaried Employees of Great Northern Paper Co.*, 382 F.3d 587 (6th Cir. 2004), which implies that the plaintiff therein might have been successful if he had elected to proceed under § 502(a)(1)(B) rather than § 502(a)(3). *Crosby* in no way advances Petitioners' theory that § 510 can be enforced through § 502(a)(1)(B) because *Crosby* did not involve a § 510 claim. The plaintiff in *Crosby* claimed that he was paid a benefit that fell $5,249.08 short of what he was entitled to. *Crosby*, 382 F.3d at 590-91. Thus, his cause of action was for recovery of benefits due him under the terms of the plan. He not only could have but should have proceeded under § 502(a)(1)(B) rather than § 502(a)(3).

Petitioners have not proffered a single Court of Appeals decision holding that § 510 can be enforced through the remedial provision of § 502(a)(1)(B). That is because the Circuits are in accord in their interpretation of the plain language of the statute. Even though this Court has never directly addressed the interplay between § 510 and § 502(a)(1)(B), the unanimity of opinion among the Courts of Appeal demonstrates that there is no compelling reason for this Court to take up the issue.

IV. The Lower Courts' Decisions Do Not Have The Effect Of Nullifying All Claims For Relief Under § 510.

Petitioners argue that the lower courts' dismissal of their ERISA claim violates accepted rules of statutory construction and effectively nullifies all claims for relief under § 510. Petitioners could not be more mistaken. Section 510 claimants have ample relief available to them – equitable relief. The fact

that Petitioners here have not articulated a viable claim for equitable relief does not mean that an equitable remedy can never be fashioned for a § 510 claimant under § 502(a)(3). The rescission remedy fashioned by the Fourth Circuit in *Griggs, supra,* is just one such remedy. *Griggs,* 385 F.3d at 443. Although *Griggs* involves a claim for breach of fiduciary duty as opposed to a violation of § 510, the case is an example of a workable equitable remedy under § 502(a)(3).

Even in the event that an equitable remedy is not available under § 502(a)(3), courts cannot override ERISA's plain language in favor of policy concerns. In *Callery v. United States Life Insurance Company in the City of New York, et als.,* 392 F.3d 401 (10th Cir. 2004), *cert. denied,* 126 S. Ct. 333 (2005), plaintiff argued that the stringent reading of the equitable relief provisions of § 502(a)(3) essentially left her without a remedy and failed to safeguard claimants from the very violations against which ERISA was designed to protect. *Id.* at 406-07. In dismissing that argument, the Tenth Circuit looked to *Mertens v. Hewitt Associates,* 508 U.S. 248 (1993), which holds that "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding specific issues under consideration." *Callery,* 392 F.3d at 407 (quoting *Mertens,* 508 U.S. at 261-62). Thus, courts are bound to interpret ERISA based upon a plain reading of its language even if that has the effect of leaving some plaintiffs without a remedy. *Id.*

In *Calhoon v. Trans World Airlines, Inc.,* 400 F.3d 593 (8th Cir. 2005), the Eighth Circuit reiterated the position taken in by the Tenth Circuit in *Callery* that ERISA claimants can be left without redress if the remedial provisions of the statute simply will not support a recovery. *Calhoon,* 400 F.3d at 598. The plaintiff in *Calhoon* argued that it was contrary to the purpose of ERISA to leave him without a remedy. *Id.* However, the Eighth Circuit noted that, according to this Court, "the judicial branch may not expand the remedial scheme prescribed in ERISA based on vague notions of policy, particularly when the

text of the statute and the Supreme Court's interpretation of the text are specific about available remedies." *Id.* (citing *Great-West*, 534 U.S. at 220-21).

Those who, like Petitioners, believe that every benefits-oriented wrong must have a remedy under ERISA incorrectly assume that ERISA is a make-whole statute, like Title VII. It is not. ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests – *not all in favor of potential plaintiffs*." *Mertens*, 508 U.S. at 262 (emphasis added). The goal of the statute was to balance employee rights against the employer's escalating pension costs. *Id.* at 262-63. Congress did not want ERISA to have a chilling effect on employer funding of pensions plans, so it drafted a statute that does not resolve every dispute in favor of the employee.

Even when fulfilling its primary goal of benefiting employees, ERISA does not grant relief to every individual plaintiff. As this Court has noted, "[a] fair contextual reading of that statute makes it abundantly clear that its draftsmen were primarily concerned with possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with rights of an individual beneficiary." *Mass. Mutual*, 473 U.S. at 142. Thus, it is understood and accepted that under ERISA certain individual plaintiffs can be left without a remedy. Petitioners fall within that category.

Section 510 is the wrongful termination/retaliatory discharge provision of ERISA. The typical § 510 case arises when an employer terminates an employee to prevent his or her pension rights from vesting. As is the case in other employment-related statutes, the anticipated remedy for such wrongful termination is reinstatement, which restores the employee to a position that will allow him or her to attain eligibility. Because the equitable remedy of reinstatement is the relief typically awarded for a § 510 violation, it makes eminent sense that the remedial provision with which it is partnered is § 502(a)(3).

Together, the two provisions provide more than adequate relief for plaintiffs who have been wrongfully terminated.

Petitioners, however, do not and cannot allege that they were victims of wrongful termination or retaliatory discharge. They were employees of AT&T Paradyne which was sold. At the time of the sale, all of the Petitioners had vested pension benefits and not a single penny of those benefits was lost. All of the Petitioners received pension benefits under the new Paradyne's defined contribution plan. The "bridging rights" in the Lucent Pension Plan were not "destroyed" or "eliminated" as Petitioners suggest, as evidenced by the fact that three of the Petitioners returned to employment with Lucent and bridged their period of service for service pension eligibility. Given these circumstances, Petitioners clearly are not the type of claimants contemplated by § 510. Therefore, the lower courts correctly held that Petitioners have no available remedy under § 502(a)(3). If an exception to that result is to be made, "it is for Congress to undertake that task," not this Court. *Millsap*, 368 F.3d at 1260 (citation omitted).

CONCLUSION

As set forth herein, the rulings by the District Court and the Third Circuit do not conflict with either a decision of this Court or a decision of any Court of Appeals. Nor do the lower court rulings implicate an important question of federal law that has not previously been addressed by this Court. Because Petitioners have not demonstrated any compelling reasons for granting their Petition, as required by Supreme Court Rule 10, Respondent Texas Pacific Group respectfully requests that the Petition be denied.

Respectfully submitted,

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